

## **EMPLOYMENT APPEALS TRIBUNAL**

CLAIM(S) OF:

CASE NO.

Employee

MN171/2006  
UD308/2006  
WT132/2006

Against

3 Employers  
under

### **MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001 ORGANISATION OF WORKING TIME ACT, 1997 UNFAIR DISMISSALS ACTS, 1977 TO 2001**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. D. Mac Carthy S C

Members: Mr J. Hennessy  
Ms. E. Brezina

heard this claim at Kilkenny on 14th May 2007

Representation:

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Claimant(s): Mr. Derek Dunne BL instructed by Mr. David M. Dunne, David M. Dunne & Co.,  
Solicitors, 31 Rose Inn Street, Kilkenny

Respondent(s): Mr. Matthew Kearney, Walter A. Smithwick & Son, Solicitors  
43 Parliament Street, Kilkenny

The determination of the Tribunal was as follows:-

#### **Claimant's Case**

The claimant told the Tribunal that he delivered takeaways from 5p.m. until 11.30pm. or later. He took instructions from another driver TG. For each delivery he undertook he received €2.55. After he finished work he returned to the restaurant and completed calculations for the owner and himself. An amount of money was written on the delivery docket, one for the owner and one for delivery and the customer did not sign the docket. All dockets were itemised and the delivery charge did not indicate the amount of the order. Ninety nine per cent of customers had menus in their homes. When he commenced work TG told him that if he earned less than €50 per night that he would pay him the balance. TG worked for the respondent for fifteen years. The claimant considered twenty eight to twenty nine deliveries a good night's work. He undertook a number of deliveries at the same time. He took his instructions from the head driver

TG. The claimant stated that he owned his own car and he was responsible for providing petrol. If he was absent on sick leave another driver worked for him. The claimant was in receipt of a disability pension and was allowed to earn a certain amount of money. After the respondent dismissed him he tried to obtain alternative employment in a nearby restaurant but he was unsuccessful. He was unemployed for a year and he obtained alternative employment five months ago.

The claimant was at home on 28 November 2005 and TG knocked at his door. JC requested TG to go to the claimant's home, as there were allegations of over charging. The claimant was informed that either he leave his job or the delivery service would close down. The claimant walked away and he did not want another man to lose his job. The claimant stated he could have made a mistake but he had never overcharged. This was the first time that the claimant was made aware of any allegations. After the allegations were made he went to one hundred of his customers and he asked them to sign a list to state that they had no complaints about overcharging. He relayed an occasion when he did not have change of €3.20 for a customer. He told the customer that he would return with change and the customer told him to deduct it from the next order. He received no further complaints from customers about being owed money.

TG asked the claimant to undertake deliveries. If the claimant was not undertaking deliveries he could be delivering ingredients for another restaurant. He was asked to undertake these duties by kitchen staff. This could happen twice a week. He told TG when he was taking holidays. Three drivers in total undertook deliveries. As far as he was aware TG received a wage from JC

In cross-examination when asked how he came to work for JC he stated that TG was head driver for fifteen years. TG told the claimant that a driver was needed. The claimant went to work and he felt that he had a good working relationship with JC. He was not told that TG provided a service to the restaurant. When questioned that TG employed him he responded that it was JC. He worked on her property and he dealt with her money. On one occasion he met JC when he delivered a takeaway to her house. When asked that the respondent did not deduct PRSI or tax he stated that he went to the Citizens Information Centre and he enquired as to what he could earn or not earn. When asked why he had not raised the issue of PRSI he said it had not arisen. He was continuously in receipt of disability benefit. When asked that he could earn €185.00 before he was means tested why he did not deal with the matter he said that he paid for the petrol and insurance for his car. If he earned €50 a night he could pay €20 for petrol and his take home pay was €30 for the night. When asked if he was self-employed he responded no. He stated that if he was self-employed that TG would receive the money for deliveries. If he was not available to drive JC would have to be informed.

If there was no delivery to be undertaken at 5p.m. when he reported for work he waited until the telephone rang, it could be ten minutes to an hour and there was no time limit as to when a customer would request an order. He had a meeting with an inspector from Social Welfare on 8 December and after this the respondent looked into the matter.

### **Respondent's Case**

Ms. JC on behalf of the respondent told the Tribunal that TG was the main driver. TG knew the claimant and he asked him to undertake deliveries. She first met the claimant when he delivered a takeaway to her house. Drivers were self-employed contractors and they provided a service to customers. TG gave the money he collected to the waiter/waitress on duty. It was money for food and €2.55 did not go to the restaurant. TG gave drivers instruction. She was not in

irect communication with the claimant. She did not give the claimant instruction on what to do. TG organised rotas for drivers and the claimant was an independent contactor.

There were four instances when the claimant overcharged customers. The claimant short changed customers and a relative of a customer approached a waitress about a discrepancy in relation to a delivery, which the claimant had not resolved. The waitress told the customer that the claimant would sort it out. The relative called to say that it had not been done and the claimant gave the money that was owed to the customer's uncle. On another occasion the restaurant had to issue a credit note for €7.50. The claimant did not rectify the situation. She spoke to the claimant about the four instances that had occurred. She told the claimant that his services were no longer required. TG initially told the claimant about the overcharging and she then spoke to the claimant. The claimant agreed that overcharging had occurred. The claimant accepted that all four instances had occurred and the claimant charged a customer €40 for an order which should have been €38. JC spoke to the customer and the claimant said he had no change. The waitress told her two customers were overcharged and the claimant was dismissed for gross misconduct. She accepted that TG told the claimant that he was dismissed.

In cross-examination JC stated that TG was employed for ten years. She gave him direction to come to work and deliver the food. If extra drivers were required he would inform her but he did not report to her on all matters. If the claimant did not earn €250 a week TG gave him the shortfall. The money that the drivers were given for deliveries was handed in to the waitress/waiter. It was then counted and put in the safe. When asked why she did not report the claimant for taxes she responded that the claimant was a self-employed contactor. The claimant was not an employee. TG would have told the claimant everything at the start. She agreed that the claimant undertook deliveries to another one of its restaurants. The claimant did not work for anyone else at this time. She agreed that the claimant obtained a list of customers from TG on her instructions.

There was no difference between the work that the claimant and TG undertook. TG was paid a €2.55 delivery charge and was paid a certain amount in his charge to the company. The claimant waited in a waiting area prior to undertaking the deliveries. She did not know anything about the claimant until he first went to her house with a delivery. A waitress told her that two customers had been overcharged. JC did not speak to the customers. She informed TG to tell the claimant that he was dismissed for gross misconduct.

## **Determination**

The claimant delivered Chinese meals to customers. The respondent said that the claimant was a self-employed contractor; the claimant argued that he worked under the respondent's control and direction at set hours and occasionally did some other work for the respondent apart from deliveries.

Having heard the evidence and having considered the various criteria laid down by the Courts to distinguish employment from self employment, the Tribunal are satisfied that the claimant worked under the control of the respondent, that his activities were an integral part of the respondent's business, that he attended at the premises from 5p.m. onwards, occasionally doing other kinds of work for the respondent. The Tribunal find therefore that the claimant was an employee.

The claimant's employment was terminated arising out of certain complaints from customers, which had been given to another waitress and were never investigated by the employer. The Tribunal did not hear the waitress let alone the customers. Nor did the respondent put these

complaints to the claimant before he was dismissed. The Tribunal find the dismissal was unfair. In assessing compensation the Tribunal have regard to the claimant's own evidence that he had expenses in running his car, which have to be taken into account and the Tribunal therefore assess his earnings at an average of €40 per night.

The Tribunal awards the claimant compensation of €400, which is equivalent to two weeks gross pay under the Minimum Notice and Terms of Employment Acts, 1973 to 2001. The Tribunal is entitled to six weeks holiday pay in the amount of €1,200 under the Organisation of Working Time Act, 1997. The Tribunal awards the claimant compensation of €10,400 under the Unfair Dismissals Acts, 1977 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)

